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IN THE

Supreme Court of the United States

October Term, 1986

GWALTNEY OF SMITHFIELD, LTD.

Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.

and

NATURAL RESOURCES DEFENSE COUNCIL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF FRIENDS OF THE EARTH, SIERRA CLUB, NATIONAL AUDUBON SOCIETY, PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP, ATLANTIC STATES LEGAL FOUNDATION, AND CONNECTICUT FUND FOR THE ENVIRONMENT IN SUPPORT OF RESPONDENTS

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This brief *amici curiae* is submitted in support of respondents Chesapeake Bay Foundation, Inc. and Natural Resources Defense Council. The petitioner and respondents have consented to the filing of this brief. Their letters of consent have been filed with the Court.

STATEMENT OF INTEREST OF AMICI

The seven organizations submitting this brief, together with the two plaintiff organizations, have been the primary plaintiffs bringing citizen suits to enforce the Federal Water Pollution Control Act ("the Water Act") during the past several years. Their members live and engage in recreational activities on or near the waterways into which companies discharge pollutants regulated by the Water Act. Petitioner's interpretation would allow dischargers who violate their permits and discharge excessive

amounts of pollution into this nation's waterways to avoid all liability for civil penalties under the Water Act if the violations ceased prior to the filing of a citizen suit. *Amici* submit that this interpretation would remove an essential incentive for polluters to comply with their permits, thereby adversely affecting *amici*'s members and the public at large.

Amici have brought numerous citizen suits under the Water Act in recent years. Contrary to petitioner's arguments (Pet. Br. 30-33), these suits were not motivated by the prospect of obtaining settlement monies for themselves, but rather by the knowledge of widespread noncompliance by dischargers and lax enforcement by government officials. For example, after analyzing a random sample of 531 major dischargers in six states, the General Accounting Office reported to Congress in 1983 that 82% exceeded their permit limits at least once in an 18-month period, and 31% exceeded their permit limits by 50% or more in at least 4 consecutive months during that time. Wastewater Dischargers Are Not Complying with EPA Pollution Control Permits, General Accounting Office, RCED-84-53, December 2, 1983, p. 7. At the same time, the GAO found that, on a national basis, the number of EPA enforcement actions declined from 1,523 in 1977 to 410 in 1982. *Id.* at 24-25. The EPA official who testified before a House oversight committee in 1984 concerning this report candidly acknowledged the shortcomings of governmental enforcement of the Water Act:[1]

> With respect to the report itself, Mr. Chairman, regardless of how one measures, regardless of how one counts, regardless of whether you look at the permittees in a particular category over 3 months, 12 months or 18 months, the trend is, in fact, the same: We continue to see a significant degree of noncompliance by permittees and we continue to see the EPA and the States falling behind in their workload.

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1. *Hearings on Implementation of the Federal Clean Water Act Before the Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportation*, 98th Cong., 2d Sess. 51 (March 7, 1984) (testimony of Jack E. Ravan, EPA Assistant Administrator for Water).

The GAO concluded in its report (p. 42) that significant enforcement resources were needed to correct this problem:

> We anticipate that the program's problems will continue because the underlying causes of many of these problems lie in the area of limited resources at both the federal and state levels. * * * Stronger enforcement against permit noncompliance is needed. * * * What can be expected * * * in the foreseeable future is continued high noncompliance and inadequate enforcement unless significant resources are directed to the program.

As a result, *amici* began using the citizen suit provisions of the Water Act on an intensive basis. Subsequently, the Senate committee report on the 1987 amendments to the Water Act stated (S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985)):

> Citizen suits are a proven enforcement tool. They operate as Congress intended—to both spur and [as a] supplement to government enforcement actions. They have deterred violators and achieved significant compliance gains.

SUMMARY OF ARGUMENT

A. Petitioner's interpretation of Section 505(a)(1) of the Act is inconsistent with the language and structure of the Act. It conflicts with this Court's recent decision in *Tull v. United States* that civil penalties necessarily relate to the punishment of past acts and are independent of injunctive relief. It conflicts with the 60-day notice provision of that Section. It unreasonably treats dischargers with identical noncompliance records totally differently based on the happenstance of when a citizen suit is filed. And it ignores the similar authorization for the imposition of civil penalties in both federal and citizen suits.

B. The legislative history of the Water Act demonstrates that Congress intended to authorize both citizen and government enforcement actions involving past violations, whether continuous

or intermittent. That history further demonstrates that Congress intended to make citizen and government enforcement powers co-extensive. If the United States and the states could seek civil penalties for past violations, but citizens could not, citizens could not effectively substitute for these governments when they fail to carry out their responsibility to enforce the Water Act.

C. The language and legislative history of the 1987 amendments to the Water Act further demonstrate that Congress intended to authorize suits for past violations. Congress gave EPA authority to assess civil penalties for past violations in administrative proceedings, and stated that citizens could, in some circumstances, seek civil penalties for past violations resulting from the same discharge as that involved in those administrative proceedings.

D. The overwhelming weight of judicial authority is inconsistent with petitioner's interpretation. At least 22 lower court decisions support respondents, while only 4 support petitioners.

E. Petitioner's interpretation would cause serious evidentiary problems. Dischargers do not monitor and report the amount of pollutants in their discharges on a continuous or, in many cases, even a frequent, basis. As a result, distinguishing between chronic, ongoing violations and past, completed ones would be an extremely difficult task. The legislative history of the Act shows that Congress did not intend enforcement actions to require lengthy fact-finding or discretionary decisionmaking, but intended instead that such actions be based on precise and manageable standards.

F. Petitioner's interpretation would remove an essential incentive for dischargers to comply voluntarily with their permits. The whole purpose of civil penalties is to induce timely and voluntary compliance. EPA, the agency charged with administering the statute, has stated that penalties for past violations are essential to carry out this purpose even when the violations have ceased. Otherwise, a discharger could totally escape liability by halting its violations before a citizen suit is filed.

G. Permitting citizens to sue for past violations would not have the adverse effects claimed by petitioner and its *amici*. Citizens, like EPA, have every incentive to use their resources for cases involving numerous and frequent violations, not isolated past violations. Both Congress and the executive branch have recently stated that citizen suits are operating as Congress intended and are not interfering with federal enforcement activities. Finally, the constitutional arguments raised by petitioner and its *amici* are insubstantial.

ARGUMENT

A. THE LANGUAGE AND STRUCTURE OF THE WATER ACT AUTHORIZES CITIZEN SUITS SEEKING PENALTIES FOR PAST VIOLATIONS

Section 505(a)(1) of the Water Act authorizes a citizen suit against any person "alleged to be in violation" of an effluent standard or limitation under that Act. Petitioner argues that because these words are in the present tense, they should be read to mean that citizen suits are limited to ongoing violations that have not abated by the time the suit is filed. Pet. Br. 11. Petitioner therefore concludes that citizens cannot bring suit seeking civil penalties for purely past violations. *Ibid.*

Petitioner's interpretation of Section 505(a)(1) is inconsistent with the language and structure of the Act for four reasons—it ignores the ordinary meaning of the word "penalty" as relating to the punishment of past acts, it conflicts with the 60-day notice provision of that Section, it treats similarly situated defendants completely differently, and it ignores the similar authorization for the imposition of civil penalties in both federal and citizen suits.

First, the very existence of a provision for civil *penalties* on its face contemplates punishment of past acts. As this Court recently stated in *Tull* v. *United States*, 481 U.S. _____ (April 28, 1987), slip op. at 10, the civil penalty provision's "authorization of punishment to further retribution and deterrence clearly evidences that this subsection reflects more than a concern to

provide equitable relief." This Court then held that civil penalties are independent of, and not intertwined with or incidental to, injunctive relief. *Id.* at 12. Thus, "[p]enalties are necessarily imposed on past violations." *SPIRG* v. *AT&T Bell Laboratories*, *supra*, 617 F. Supp. at 1198. Obviously, they cannot be imposed on violations that have not yet occurred. Consequently, the phrase "and apply appropriate civil penalties under Section 309(d)" must mean that a court may impose civil penalties for past violations in a citizen suit under Section 505.

Petitioner's construction puts far too much weight on Congress' use of the present tense. "A plausible construction of the language is that one is 'in violation' and continues to be 'in violation' by having 'violated.'" *SPIRG* v. *Monsanto Co.*, 600 F. Supp. 1474, 1476 (D.N.J. 1985). The words "to be in violation" therefore may reasonably be read as to include unlawful conduct occurring before a lawsuit is filed as well as unlawful conduct that continues into the present.

Furthermore, if Congress had used the past tense in conjunction with the civil penalty provision, it "might have created the implication that citizen suits could not seek injunctive relief." *SPIRG* v. *AT&T Bell Laboratories*, *supra*, 617 F. Supp. at 1196. Indeed, as we show below (pp. 12-13), when Congress amended the Act this year and used the past tense ("has violated") to describe EPA's new administrative civil penalty authority, it stated its intention in the legislative history to limit such authority to purely past violations. S. Rep. No. 50, *supra*, p. 100.

Second, the combination of the civil penalty provision and the notice requirement in Section 505(b)(1)(A) also shows that Congress did not expect citizens to bring actions only for violations occurring at the time a suit was filed. That subsection requires that citizens give 60 days' notice before filing suit to governmental agencies to "give the administrative enforcement office an opportunity to act on the alleged violation." S. Rep. No. 414, 92d Cong., 1st Sess. 80 (1971). However, if petitioner's argument were correct, Congress would, in effect, be telling citizens to provide 60 days' notice of alleged violations before filing

suit, but then telling them they could not bring suit for civil penalties based on the same violations. Instead, suit could only be brought if new violations-not covered by the notice letter—were occurring at the time of suit. We submit that Congress could not have intended such an absurd result.

Third, petitioner's argument would have the effect of treating dischargers with identical records of noncompliance in totally different ways. Thus, assume that Company A has violated the Act 100 times over a three-year period, but stops its violations a month before the citizen suit is filed, while Company B has the same number of violations over the same time period, except that five of its violations occurred after the citizen suit was filed. Under the amended Water Act, each violation is subject to a penalty up to $25,000 per day for each violation. 33 U.S.C. 1319(d), as amended, 101 Stat. 45. Under petitioner's interpretation, Company A is not subject to any civil penalty, while Company B is subject to a civil penalty up to $2,500,000. We submit that it makes no sense to impose large penalties on a company for pre-complaint violations because it happened to have some violations after the complaint was filed, but no penalties on the company which had no violations after a complaint was filed.

Finally, the structure of the federal enforcement provisions of the Act shows that Congress intended to authorize civil penalties for past violations. The Administrator of EPA is empowered to take enforcement actions by Section 309 of the Act. 33 U.S.C. 1319. The citizen suit provision specifically cross-references the federal government's civil penalty authority in Section 309(d).

All of the federal enforcement provisions are couched in the present tense. Under Section 309(a)(1), the Administrator is authorized to take enforcement action, including court action, whenever he "finds that any person *is in violation* of any condition or limitation * * * " under the Act (emphasis added). Under Section 309(a)(3), the Administrator may issue a compliance order when he "finds that any person *is in violation*" of the Act (emphasis added). Under Section 309(c), criminal penalties

may be imposed on "any person who willfully or negligently *violates*" the Act (emphasis added). Under Section 309(d), civil penalties may be imposed against "any person who *violates*" the Act (emphasis added). Consequently, if the "present tense" is deemed to limit jurisdiction in citizen suits, the same "present tense," used in all of the Act's enforcement provisions, must equally limit suits for civil penalties by the United States.

There is no basis for imposing such a limitation on suits by the United States. On the contrary, it is well established that the United States may sue for penalties under Section 309(d) based on past violations, without a showing of violations at the time of suit. In *Tull* v. *United States*, *supra*, this Court held that the government's claim for civil penalties under the Water Act was not "incidental to" its claim for injunctive relief, and that the government could prosecute that claim even though it "was aware when it filed suit that relief would be limited primarily to civil penalties, since the [defendant] had already sold most of the properties at issue." Slip op. at 12. Similarly, the Court of Appeals for the Tenth Circuit has held that "[i]t is plainly inconsistent with the strong enforcement policy of the Act to declare that EPA must choose between prevention of future pollution discharges and punishment of past violations through civil penalties. The administrator needs both sanctions." *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 376 (10th Cir. 1979).

No reason exists for believing that Congress intended one meaning for the language in Section 309(d) for suits brought by EPA and another meaning for that language for suits brought by citizens. See *SPIRG v. AT&T Bell Laboratories*, *supra*, 617 F. Supp. at 1198. Indeed, the cross-reference to Section 309(d) in Section 505(a)(1) necessarily means that citizens, like EPA, can bring enforcement actions to assess penalties for past violations.[2]

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2. We know of no federal statutes under which past violations can be punished only if they are continuing or repeated at the time of suit. This is true even though numerous statutes similarly use the present tense in provisions authorizing the imposition of penalties. See, *e.g.*, Clean Air Act, 42 U.S.C. 7413; Marine Protection, Research and Sanctuaries Act, 33 U.S.C. 1415(a); Noise Control Act, 42 U.S.C. 4290.

B. THE LEGISLATIVE HISTORY OF THE WATER ACT SHOWS THAT THE ACT AUTHORIZES CITIZEN SUITS SEEKING PENALTIES FOR PAST VIOLATIONS

There is nothing in the legislative history of the 1972 Water Act even suggesting that Congress intended its use of the present tense in Section 505(a)(1) to have so drastic an effect as petitioner contends. On the contrary, Senator Muskie, the principal sponsor of the Senate bill, stated during the floor debates that, under the citizen suit provision agreed to by the Conference Committee (118 Cong. Rec. 33700 (1972)):

> A citizen has the right under Section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be, or *to have been*, in violation, whether the violation be a continuous one, or an occasional or sporadic one. [emphasis added]

Thus, Senator Muskie clearly stated that Congress intended to authorize citizen suits based on past violations.

The legislative history of the federal enforcement section of the Act, Section 309(d), further supports this conclusion. Section 309(a) provides that the Administrator of EPA can take enforcement actions, including a civil action to impose civil penalties under Section 309(d), whenever he "finds" a violation to exist. The Senate Conferees' statement on the Conference Report explains that, under this section (118 Cong. Rec. 33697 (1972)):

> It is expected, of course, that upon receipt of information that a violation *has occurred*, [the Administrator] has an affirmative duty to take steps necessary to determine whether a violation *has occurred* including such investigations as may be necessary, and to make his finding as expeditiously as practicable. [emphasis added]

Moreover, the legislative history of the Water Act demonstrates that the scope of enforcement and the remedies available for citizen suits and EPA civil suits are the same. The Senate Report states (S. Rep. No. 414, *supra*, p. 64):

> It should be noted that if the Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action under the citizen suit provisions of section 505.

The Senate Report further states (*id.* at 80):

> The standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are the same. Therefore the participation of citizens in the courts seeking enforcement of water pollution control requirements should not result in inconsistent policy.

Moreover, in emphasizing that enforcement actions would be brought against past violators, Senator Muskie pointed to the parallel nature of EPA and citizen enforcement (118 Cong. Rec. 33693 (1972)):

> The Administrator's authority is not limited to those cases in which there is a continuing violation. Any discharge, intermittent or continuous, which the Administrator finds violates the terms of the permit, is to be enforced. • • • Citizen suits can be brought to enforce against both continuous and intermittent violations.

Thus, Congress intended that the various civil enforcement mechanisms be uniform. Otherwise, if EPA and the States could sue for civil penalties for past violations, but citizens could not, this would significantly reduce the effectiveness of citizen enforcement when EPA or the States fail to carry out their responsibilities. Citizens could not effectively substitute for EPA or the states "as private attorneys general"—the term applied to citizen plaintiffs by this Court in *Middlesex County Sewerage Authority* v. *National Sea Clammers' Ass'n*, 453 U.S. 1, 16-17 (1981). For these reasons, numerous district court decisions have similarly recognized that "the remedies obtainable in citizen suits should be coextensive with those available in suits initiated

by the federal government." *Connecticut Fund for the Environment* v. *The Job Plating Co., Inc.*, 623 F. Supp. 207, 213 (D. Conn. 1985). Accord, *SPIRG* v. *Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1425 (D.N.J. 1985); *SPIRG* v. *Monsanto Co.*, *supra*, 600 F. Supp. at 1476; *SPIRG* v. *AT&T Bell Laboratories*, *supra*, 617 F. Supp. at 1199.

Petitioner places primary weight on passages from Senate Report No. 414 that emphasize the use of citizen suits to abate ongoing violations. Pet. Br. 26. However, as the court of appeals noted below (791 F.2d at 311), none of these passages state that abatement of ongoing violations is the only relief available under Section 505(a). Indeed, the statute is explicit that this is not the only relief provided since it specifically authorizes citizens to sue for penalties.

Furthermore, the relevance of these passages to the issue before the Court is questionable because each of them is drawn virtually verbatim from the Senate Report on the citizen suit provision of the Clean Air Act. Cf. S. Rep. No. 414, *supra*, pp. 79-81, with S. Rep. No. 1196, 91st Cong., 2d Sess. 36-38 (1970). Since the Clean Air Act does not authorize civil penalties in citizen suits, Congress had no reason to discuss them, and necessarily confined its discussion to the abatement of ongoing violations.

In authorizing such penalties under the Water Act, Congress recognized this fundamental difference between the citizen suit provisions in the two statutes. The House Report on the Water Act states (H. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972)):

> Section 505 closely follows the concepts utilized in section 304 of the Clean Air Act. However, this legislation authorizes the courts to impose civil penalties, as well as injunctive relief.

The Senate Report likewise notes (S. Rep. No. 414, *supra*, p. 79):

> The Committee has established a provision in the bill that would provide citizen participation in the enforcement of control requirements and regulations established under this Act modeled on the provision enacted in the Clean Air

> Amendment of 1970. * * * One modification would allow the Courts to impose civil penalties provided as a result of actions brought by citizens.

Thus, in the Water Act, Congress deliberately gave citizens a second enforcement weapon, civil penalties.

In sum, the legislative history of the 1972 Water Act shows that Congress intended, unlike in the Clean Air Act, to authorize both citizen and government suits for civil penalties based on past violations.

C. THE LANGUAGE AND LEGISLATIVE HISTORY OF THE 1987 AMENDMENTS TO THE WATER ACT SHOW THAT THE ACT AUTHORIZES CITIZEN SUITS SEEKING PENALTIES FOR PAST VIOLATIONS

The language and legislative history of the 1987 amendments to the Water Act further demonstrate that Congress did not intend to limit the reach of the Act's judicial enforcement provisions to prospective violations.

In those amendments, Congress gave EPA new authority to impose civil penalties administratively without filing a judicial enforcement action. Pub. L. 100-4, Section 314, 101 Stat. 46-49. In defining this new authority, Congress authorized EPA to institute such administrative actions where a person "has violated" the Act. 101 Stat. 46. This language contrasts with the present tense language in the judicial enforcement sections, Sections 505 and 309, which Congress left unchanged.

The "has violated" language originated in the Senate. S. Rep. No. 50, 99th Cong., lst Sess. 100 (1985).[3] The Senate Report on this provision states (S. Rep. No. 50, *supra*, p. 26):

> This new authority is designed to address past, rather than continuing, violations of the Act. Continuing violations are more appropriately addressed by abatement orders or

3. The House bill used the words, "is in violation." H. Rep. No. 189, 99th Cong., 1st Sess. 89 (1985).

> injunctive actions and, if EPA seeks both civil penalties and injunctive relief, one judicial action should be filed.

Thus, when Congress wanted to limit enforcement authority to *purely* past violations, it chose the terms "has violated."

Furthermore, Congress intended that citizens would, in some circumstances, be able to bring citizen suits covering this same set of purely past violations. This conclusion is confirmed by a later passage in the same Senate Report which discusses the preclusive effect of administrative civil penalty actions on citizen suits. Under these preclusion provisions, the pendency of an EPA or state administrative enforcement proceeding concerning a violation of the Act may, in certain specified circumstances, prevent "a civil penalty action under * * * Section 505" as to that same violation. 101 Stat. 47-48. The passage in the Senate Report states that this preclusive effect (S. Rep. No. 50, *supra*, p. 28):

> would not apply to an action for civil penalties for a violation of the same requirement of the Act that is not being addressed administratively *or for a past violation of another pollutant parameter (even one resulting from the same discharge which is the subject of the administrative civil penalty proceeding)*. [emphasis added]

Thus, by expressly stating that citizens could, in some circumstances, seek civil penalties for past violations resulting from the same discharge (but a different pollutant parameter) as that involved in an administrative penalty proceeding, Congress necessarily meant that citizens could seek civil penalties for past violations under Section 505.

Consequently, the language and legislative history of the 1987 amendments to the Water Act confirm that citizens can seek penalties for past violations.

D. THE WEIGHT OF JUDICIAL AUTHORITY SUPPORTS RESPONDENTS' POSITION THAT THE ACT AUTHORIZES CITIZEN SUITS SEEKING PENALTIES FOR PAST VIOLATIONS

The lower courts have repeatedly held that citizens may sue for past violations. *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield*, *supra*, 791 F.2d at 313; *Connecticut Fund for the Environment* v. *The Job Plating Co.*, *supra*, 623 F. Supp. at 213-214; *Fishel* v. *Westinghouse Electric Corp.*, 617 F. Supp. 1531, 1541 (M.D. Pa. 1985); *Sierra Club* v. *Hanna Furnace Corp.*, *supra*, 636 F. Supp. at 529-530; *Sierra Club* v. *Simkins Industries*, 617 F. Supp. 1120, 1126-1127, 1131-1132 (D. Md. 1985); *Sierra Club* v. *Aluminum Co. of America*, 585 F. Supp. 842, 854 (N.D.N.Y. 1984); *Sierra Club* v. *Raytheon Co.*, 22 Env't Rep. Cases (BNA) 1050, 1053-1055 (D. Mass. 1984); *Sierra Club* v. *C.G. Manufacturing, Inc.*, 638 F. Supp. 492, 494 (D. Mass. 1985); *State of Alabama ex rel. Graddick* v. *Veterans Administration*, 648 F. Supp. 1208, 1211 (M.D. Ala. 1986); *Locust Lane* v. *Swatara Township Authority*, 636 F. Supp. 534, 539 (M.D. Pa. 1986); *Atlantic States Legal Foundation* v. *Al Tech Specialty Steel Corp.*, 635 F. Supp 284, 287 (N.D.N.Y. 1984); *Friends of the Earth* v. *Archer Daniels Midland Co.*, 24 Env't Rep. Cases (BNA) 1993, 1995-1996 (N.D.N.Y. 1986); *SPIRG* v. *AT&T Bell Laboratories*, *supra*, 617 F. Supp. at 1194-1199; *SPIRG* v. *Georgia-Pacific Corp.*, *supra*, 615 F. Supp. at 1425-1426; *SPIRG* v. *Monsanto Co.*, 600 F. Supp. 1479, 1486 (1985); *SPIRG* v. *P.D. Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074, 1083-1084 (D.N.J. 1986); *SPIRG* v. *Jersey Central Power & Light Co.*, 642 F. Supp. 103, 107 (D.N.J. 1986); *SPIRG* v. *American Cyanamid Co.*, 23 Env't Rep. Cases (BNA) 2044, 2049 (D.N.J. 1985); *SPIRG* v. *National Starch and Chemical Corp.*, 23 Env't Rep. Cases (BNA) 1982, 1984 (D.N.J. 1985); *SPIRG* v. *Tenneco Polymers*, 602 F. Supp. 1394, 1399 (D.N.J. 1985); *SPIRG* v. *Anchor Thread Co.*, 22 Env't Rep. Cases (BNA) 1150, 1154 (D.N.J. 1984); *SPIRG* v. *Ragen Precision Industries*,

D.N.J., No. 83-1604, December 19, 1983, Transcript of Proceedings, p. 7.

In contrast, there are only a handful of decisions supporting petitioner's interpretation of the Act. *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392, 395 (5th Cir. 1985); *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 807 F.2d 1089, 1093 (1st Cir. 1986), petition for certiorari filed, No. 86-1562 (March 17, 1987); *Sierra Club* v. *Copolymer Rubber & Chemical Corp.*, 621 F. Supp. 1013, 1015 (M.D. La. 1985); *Sierra Club* v. *Kerr-McGee Corp.*, 23 Env't Rep. Cases (BNA) 1685, 1690 (W.D. La. 1985).

E. THE EVIDENTIARY PROBLEMS WHICH WOULD RESULT UNDER PETITIONER'S INTERPRETATION SHOW THAT IT IS CONTRARY TO THE INTENT OF THE ACT

Petitioner's interpretation of Section 505 would make it extremely difficult for citizens to exercise their rights under that Section.

Section 308 of the Act gives EPA authority to require record-keeping, monitoring, and reporting of discharges of pollutants. 33 U.S.C. 1318. Under EPA regulations, a permittee under EPA's National Pollutant Discharge Elimination System (NPDES), as petitioner is, must monitor its own discharges according to a schedule established in its permit and report them on a regular basis on Discharge Monitoring Reports (DMRs). 40 C.F.R. 122.41(1)(4). These DMRs constitute the basis for determining whether or not the permit holder is in compliance with its permit limitations.

The timeliness of the data contained in DMRs depends on two variables, the frequency of monitoring and the frequency of reporting. In the present case, petitioner monitored its discharge three times a week. Pl. SJ Motion, Ex. A, pp. B, Q. However, monitoring may be performed on a less frequent basis. EPA regulations only require monitoring with a "frequency sufficient to yield data which are representative of the monitored activity

* * *." 40 C.F.R. 122.48(b). See also 122.41(j)(l). It is not unusual for permittees to monitor only once a month.[4]

As to reporting frequency, petitioner submitted DMRs on a monthly basis. However, DMRs may be submitted less frequently. See, *e.g.*, *SPIRG v. Hercules, Inc.*, *supra*, 23 Env't Rep. Cases (BNA) at 2090 (quarterly reporting). EPA regulations require NPDES permittees (40 C.F.R. 122.44(i)(2)):

> to report monitoring results with a frequency depending on the nature and effect of the discharge, but in no case less than once a year.

Infrequent monitoring and reporting causes two types of problems with the availability of effluent data. First, there may be a considerable period of time between the date the discharge is monitored and the date that the DMR is mailed to EPA and therefore becomes available to the public. For example, in *SPIRG v. Hercules, Inc.*, *supra*, 23 Env't Rep. Cases (BNA) at 2090, the defendant monitored once a month, prepared a DMR once every three months, and was required to mail that DMR to EPA "no later than the 28th day of the month following the completed reporting period". Thus, in that case, there was a delay of about 4 months between the first monitoring event of the quarter and the date that event became known to the public. Consequently, it is often impossible for citizens to determine a permittee's current compliance status.

Second, there may be considerable periods of time between successive monitoring days, as well as between successive DMRs. Monitoring may occur on only three days over three months, or even one day over a six-month period. In addition, DMRs may be filed every three months, every six months, or even every twelve months. Thus, neither monitoring nor reporting is "continuous." Those activities are regular, but infrequent. As a result, the

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4. See, *e.g.*, *SPIRG* v. *American Cyanamid Co.*, *supra*, 23 Env't Rep. Cases (BNA) at 2050; *SPIRG* v. AT&T Bell Laboratories, *supra*, 617 F. Supp. at 1204-1205; *SPIRG* v. *Hercules Corp.*, 23 Env't Rep. Cases (BNA) 2081, 2090-2091 (D.N.J. 1986); *SPIRG* v. *National Starch and Chemical Corp.*, *supra*, 23 Env't Rep. Cases (BNA) at 1985.

continuing or episodic nature of violations, or of compliance, is not necessarily apparent from DMRs.

The present case illustrates the difficulties inherent in petitioner's interpretation of Section 505(a)(1). Respondents gave notice of their intent to sue on February 29, 1984. Petitioner's violations continued until May 15, 1984, and those May violations were reported in a DMR which was completed by petitioner on June 8, 1984, and presumably filed with EPA several days later. Pet. Br. 19, n. 19. Respondents filed suit almost immediately thereafter on June 15, 1984. Petitioner's compliance with its permit in June 1984 was reported in a DMR which was not filed until sometime in July 1984, after respondents filed this action. Consequently, respondents could not possibly have determined petitioner's post-May 15 compliance status before their complaint was filed.

Furthermore, respondents could not have determined at the time the complaint was filed whether petitioner was continuing to violate its permit. Petitioner admits that, to avoid the absurd result that a company can be sued only if it is violating its permit on the day the complaint is filed, the statute must be read to include the "chronic episodic violator" who has "ongoing intermittent violations." Pet. Br. 16-17, 29, n. 30. Under this standard, even if respondents could somehow have known on June 15 that petitioner had not violated its permit for the prior 30 days, a single month's compliance would not show whether petitioner was a "chronic episodic violator." At that time, there was no assurance that violations would not be reported in subsequent months. To eliminate the possibility that petitioner's violations were "ongoing intermittent" ones, respondents would have had to have been clairvoyant and predicted the company's future discharges months in advance.

Furthermore, we submit that the facts in petitioner's case are relatively easy to analyze, since it monitored its discharge three times a week and reported those results on a monthly basis. As we have noted above, some dischargers monitor only monthly and report only quarterly. How does a citizen identify a "chronic

episodic violator" when reporting data is this infrequent? How long should a citizen wait to determine whether past intermittent violations have "completely abated" or are "ongoing"? One quarter? One year? And, even if the citizen waits one year, how does he still know whether the violations have ended after the last reporting data which is publicly available?

The court decisions which have required a continuing violation similarly demonstrate the difficulty of defining and implementing that concept. For example, petitioner cites *Sierra Club* v. *Kerr-McGee Corp.*, *supra*, as a case that correctly applied its interpretation of the Act. Pet. Br. 17. In *Kerr-McGee*, plaintiffs filed suit on June 29, 1984 (23 Env't Rep. Cases (BNA) at 1689), and submitted evidence of permit violations from December 1980 through July 1984 (*id.* at 1686). The court held that violations prior to January 3, 1984, were not continuing or actionable, but that those between January 3 and July 24, 1984, were continuing and actionable, even though the latter set of violations were intermittent and did not include a violation on the day the suit was filed. *Id.* at 1690 and n. 3. Indeed, in the latter set, the permit violations closest to the June 29 date of the complaint were on May 22 and July 24. *Ibid.* If two violations in three months mean that those violations "continue unabated," as petitioner argues (Pet. Br. 17), it is difficult to give any clear meaning to these terms.

Furthermore, it is impossible to see "a profound difference" (Pet. Br. 17) between the facts in petitioner's case and the facts in *Kerr-McGee*. In 1984, petitioner reported 10 violations in January, 6 in February, 1 in March, 4 in April, 2 in May, and none in June or July. 611 F. Supp. at 1566. The complaint was filed in June. In that same year, Kerr-McGee reported violations on 6 days in January, none in February, 1 day in March, 2 days in April, 2 days in May, none in June and 1 day in July. 23 Env't Rep. Cases (BNA) at 1690, n. 3. Again, the complaint was filed in June. *Thus, during the same seven month period, each company reported violations in five months, and plaintiff's complaint in each case was filed in the same month.* Yet, according to

petitioner, in one case jurisdiction should be sustained and in the other it should be rejected. Pet. Br. 17-18.

We submit that petitioner's interpretation is not only unreasonable and unworkable, but directly contrary to the intent of Congress. Congress recognized that the successful operation of the Act's citizen suit provision depends on the timely disclosure of a polluter's discharge information. The Senate Report states (S. Rep. No. 414, *supra*, pp. 62, 81):

> A necessary adjunct to the establishment of effective water pollution requirements and the enforcement of such requirements is authority to require information, data, and reports, as well as to establish monitoring requirements.
>
> * * *
>
> The information and other disclosure provisions required throughout this bill are important to the operation of this provision. The Administrator would have a special duty to make meaningful information on discharging sources available to the public on a timely basis.

Congress also recognized that enforcement actions based on such information should be simple and expeditious. Thus, the Senate Report states (*id.* at 64, 65, 80, 81):

> [T]he bill reported from the Committee establishes and makes *precise new requirements* imposed on persons and subject to enforcement. One purpose of these requirements is to *avoid the necessity of lengthy fact finding, investigations*, and negotiations at the time of enforcement. Enforcement of violations of requirements of this Act should be based on a *minimum of discretionary decisionmaking or delay*.
>
> * * *
>
> The Committee believes that if the timetables established throughout the Act are to be met, the threat of sanctions must be real, and *enforcement provisions must be swift and direct*.
>
> * * *
>
> An alleged violation of an effluent control limitation or standard would not require reanalysis of technological

> [or] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the provisions. Therefore, an *objective evidentiary standard* will have to be met by any citizen who brings an action under this section.
>
> * * *
>
> The standards for which enforcement would be sought under either administrative enforcement or through citizen enforcement procedures are the same. * * * Consequently, the factual basis for enforcement of requirements would be available at the time enforcement is sought and the issue before the courts would be a factual one of *whether there had been compliance*.
>
> * * *
>
> The citizen suit provision is consistent with principles underlying the Federal Water Pollution Control Act, that is the development of *clear and identifiable requirements*. Such requirements should provide *manageable and precise benchmarks for enforcement*. [emphases added]

Petitioner's interpretation is directly inconsistent with this legislative intent. It would engage the litigants in discovery battles over whether a discharge is continuing and would engage the courts in a search for standards to apply in resolving the continuing discharge issue. Such standards would not be "manageable" or "precise," would require "lengthy fact finding, [and] investigations," and would prevent the enforcement provisions from being based on "a minimum of discretionary decisionmaking or delay."

Aside from petitioner's proposed standard, the other standards suggested by the court decisions relied on by petitioner are equally inconsistent with Congressional intent. The Fifth Circuit's test in *Hamker* v. *Diamond Shamrock Chemical Co.*, *supra*, 756 F.2d at 395, *i.e.*, whether a violation occurs on the date the complaint is filed, is hopelessly unrealistic given the practicalities of how infrequently and how slowly permittees monitor and report the pollutants in their discharges. Citizen plaintiffs could not know in advance the day on which monitoring would occur. It would be an unusual coincidence if monitoring even happened to occur on the day the complaint was filed.

In *Pawtuxet Cove Marina* v. *Ciba-Geigy Corp.*, *supra*, 807 F.2d at 1093, the First Circuit attempted to draw a line between "conduct indicative of continuing or renewed violations justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one." In drawing this line, the court directed the district courts to "consider, among other things, the isolated or recurrent nature of the infraction, the degree of scienter on the part of the defendant, and the sincerity of its assurances against future violations." *Id.* at 1094. This test is quintessentially discretionary and imprecise. Moreover, it confuses the traditional standards for an injunction based on the likelihood of recurring violations with the totally different question whether the defendant should be penalized because violations have already occurred. Finally, by examining the defendant's degree of scienter and "sincerity," that test is directly inconsistent with the principle that polluters are strictly liable for permit violations, regardless of their good faith. *United States* v. *Earth Sciences, Inc.*, *supra*, 599 F.2d at 374.

F. CIVIL PENALTIES FOR PAST VIOLATIONS ARE ESSENTIAL TO CARRY OUT THE STATUTORY PURPOSE OF DETERRING VIOLATIONS BY PETITIONER AND OTHER POLLUTERS

Petitioner argues that the primary goal of the Act is to encourage permit compliance and that, once compliance is achieved, no further citizen action is necessary. Pet. Br. 25-26. This argument seriously misapprehends the purpose of the statute.

The whole purpose of the civil penalty provision is to induce timely and voluntary compliance. Penalties serve to deter violations both by the violator ("specific deterrence") and by other polluters ("general deterrence"). EPA has emphasized these points in its policy statement on enforcement of civil penalties (U.S. Environmental Protection Agency, Policy on Civil Penalties, EPA General Enforcement Policy GM-21 (Feb. 16, 1984),

pp. 3-4, reprinted in Env't Rep. (BNA) (Fed. Laws) 41:2991-3003):

> The first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence).
>
> • • •
>
> If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. • • • For these reasons, it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law.
>
> • • •
>
> The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law. This additional amount should reflect the seriousness of the violation [the "gravity component"]. In doing so, the penalty will be perceived as fair. In addition the penalty's size will tend to deter other potential violators.
>
> In some classes of cases, the normal gravity calculation may be insufficient to effect general deterrence. This could happen if, for example, there was extensive noncompliance with certain regulatory programs in specific areas of the United States. This would demonstrate that the normal penalty assessments had not been achieving general deterrence. In such cases, the case development team should consider increasing the gravity component sufficient to achieve general deterrence.

EPA has emphasized in its policy statements that achievement of these goals of specific and general deterrence requires the imposition of civil penalties even if the violator has come into compliance (U.S. Environmental Protection Agency, Agency-wide Compliance and Enforcement Strategy and Strategy

Framework for EPA Compliance Programs (May 1984), p. 26, quoted in *SPIRG* v. *AT&T Bell Laboratories*, *supra*, 617 F. Supp. at 1201, n.4):

> Civil penalty actions are often necessary even if the underlying violation has been corrected, to deter future violations, and to restore economic equity to other regulated parties which have invested the resources needed to be in compliance all along.

Thus, EPA has clearly stated that penalties for past violations, even when the violations have ceased, are essential to carry out the purpose of the statute. EPA's interpretation of the Act "is entitled to considerable deference" by this Court. *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council*, 470 U.S. 116, 125 (1985).

Furthermore, Congress expressly mandated that all permittees comply with their permits by July 1, 1977. 33 U.S.C. 1311(b)(1). Petitioner was out of compliance with its permit until May 1984. While petitioner claims that it made substantial investments to achieve compliance by this date (Pet. Br. 4-6), it delayed that investment for years and therefore gained a large economic benefit. A failure to impose civil penalties in such cases would encourage other companies to delay their compliance with the Water Act.

Indeed, petitioner's argument that penalties are not available unless the permittee is currently "in violation" would encourage permittees to do nothing until they were notified that a suit was imminent. If the company then came into compliance before suit was brought, it would totally escape any penalty for its violation of the statute. Such a result would seriously undermine the deterrent purpose of the statute. See, *e.g.*, *Sierra Club* v. *Hanna Furnace Corp.*, *supra*, 636 F. Supp. at 529.

The fact that petitioner is no longer violating its permit does not mean that civil penalties will have no deterrent effect on petitioner in the future. Petitioner's NPDES permit is still in full force and effect, and petitioner is still discharging into the Pagan River. Pet. Br. 21. Petitioner may still violate its permit. It

therefore serves the deterrent purpose of the Act for petitioner to know that it cannot escape liability for any future permit violations by again halting the violations before a complaint is filed in federal court. *SPIRG* v. *AT&T Bell Laboratories*, *supra*, 617 F. Supp. at 1200.

Furthermore, penalizing petitioner for its past noncompliance in this case will deter other polluters. Such polluters will have greater incentive to comply quickly with their permits if they know they can be sued for past violations, even if they cease discharging or come into compliance before they are sued. On the other hand, if, as petitioner proposes, polluters can retain an economic advantage from years of noncompliance and escape any consequences for its permit violations, there would be a substantial disincentive to voluntary compliance.

G. PERMITTING CITIZEN SUITS BASED ON PAST VIOLATIONS WILL NOT HAVE THE ADVERSE EFFECTS ALLEGED BY PETITIONER

Petitioner argues that permitting citizens to sue for past violations would have serious adverse effects, *i.e.*, burdening the federal courts with a flood of citizen suits, providing an incentive for citizens to obtain settlements benefitting environmental organizations rather than the U.S. Treasury, interfering with governmental enforcement activities, and raising serious constitutional issues. Pet. Br. 30-37. These arguments are specious at worst and diversionary at best.

On the one hand, these arguments prove too much. All of them might support an argument that citizen plaintiffs should not be allowed to sue for penalties at all. However, this is an argument which Congress has obviously not accepted since it explicitly provided that citizens could sue for the imposition of penalties. On the other hand, these arguments prove too little. Not one of them supports petitioner's position that citizen suits for penalties relating to continuing violations are authorized, but identical suits based on past violations are not.

Petitioner claims that citizen suits under the Water Act will burden the federal courts. Pet. Br. 33. Petitioner speculates that, since there are 65,000 outstanding permits, every one of these is potentially the subject of a citizen suit, because EPA writes every permit with the statistical expectation that 100 percent compliance is impossible. *Id.* at 34.[5]

The short answer to petitioner's *in terrorem* argument is that we know of no suit brought by a citizen plaintiff for one or even a few routine violations of an NPDES permit, and petitioner cites none. The reason is undoubtedly because such a suit is extremely unlikely to succeed. First, in cases where violations are random and infrequent, there is reason to expect the permittee to invoke the "upset" defense in EPA's regulations, which, when incorporated in the permit, provide an affirmative defense for exceptional incidents in which there is temporary and unintentional noncompliance with technology-based limits because of factors beyond the reasonable control of the permittee. 40 C.F.R. 122.41(n). Second, when few violations are involved, the courts are not likely to impose significant penalties, since they must consider the history and seriousness of the violations in setting a penalty. 33 U.S.C. 1319(d), as amended, 101 Stat. 45.

Petitioner also argues that allowing citizens to sue for past violations will encourage citizens to use the citizen suit provision

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5. EPA's decision to write permits in this way is perfectly reasonable. If EPA drafted a permit to encompass all the potential statistical variability in a company's discharge, it would have to set the permit limits so high as to be meaningless as a regulatory control device. "One of the goals of the NPDES permit program is to insure that pollution-control facilities are operated as efficiently and carefully as possible." *U.S. Steel Corp.* v. *Train*, 556 F.2d 822, 842 (7th Cir. 1977). The limits therefore should not be set so high as to "build in a factor for human or mechanical lapses." *Ibid.* Accord, *CPC International* v. *Train*, 540 F.2d 1329, 1337-1338 (8th Cir. 1976); *American Petroleum Institute* v. *EPA*, 540 F.2d 1023, 1036 (10th Cir. 1976)("As technology for control of pollutant discharges improves, the variations should lessen").

Despite its theoretical statistical expectation that 100% compliance may be impossible, EPA actual regulatory expectation is that 100% compliance is achievable by all permittees. Thus, EPA's regulations provide that permittees must comply with their permits at all times and that any permit violation is a violation of the Water Act. 40 C.F.R. 122.41(a).

to extract environmental contributions from defendants in lieu of the payment of civil penalties to the U.S. Treasury. Pet. Br. 30-32. However, such environmental contributions are neither illegal nor improper. They were first approved as a remedial option in EPA's 1980 civil penalty policy.[6] In its 1984 civil penalty policy, EPA stated that "the Agency has accepted various environmentally beneficial expenditures in settlement of a case and chosen not to pursue more severe penalties."[7] The Justice Department has followed this practice in its own enforcement actions under the Act.[8] Most recently, environmental contributions were expressly endorsed in the Conference Report on the Senate bill which became the 1987 amendments to the Water Act (H. Rep. No. 1004, 99th Cong., 2d Sess. 139 (1986)):

> In certain instances settlements of fines and penalties levied due to NPDES permit and other violations have been used to fund research, development and other related projects which further the goals of the Act. In these cases, the funds collected in connection with these violations were used to investigate pollution problems other than those leading to the violation. Settlements of this type preserve the punitive nature of enforcement actions while putting the funds collected to use on behalf of environmental protection. Although this practice has been used on a selective basis, *the conferees encourage this procedure where appropriate.* [emphasis added]

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6. EPA Civil Penalty Policy For Major Source Violators of Clean Air Act and Clean Water Act (July 8, 1980), Env't Rep. (BNA) (Fed. Laws) 41:1101, 1106.

7. EPA Civil Penalty Policy (Feb. 16, 1984), reprinted in Env't Rep. (BNA) (Fed. Laws) 41:2991, 3002. In its 1986 civil penalty policy, EPA again authorized such environmental contributions, but stated that "[t]he government should continue to consider mitigation projects as the exception rather than the rule." U.S. Environmental Protection Agency, Clean Water Act, Penalty Policy for Civil Settlement Negotiations, February 11, 1986.

8. See, *e.g.*, *United States* v. *Amoco Oil Co.*, Civil No. 80 0801 (W.D. Mo. 1984) (consent decree requiring $350,000 civil penalty to the United States and $150,000 contribution "to an organization or organizations operating in the State of Missouri designated by defendant for use on any project relating to hazardous waste"), discussed in 15 Env't Rep. (BNA) (Current Developments) 686 (Aug. 31, 1984).

Thus, both Congress and the executive branch have sanctioned environmental contributions in appropriate cases.[9]

Petitioner further argues that permitting citizens to sue for past violations interferes with the enforcement authority of EPA and the States under the Act. Pet. Br. 35-36. However, the United States has strongly taken the position that the citizen suit provision assists the enforcement authority of the executive branch. Thus, in a *amicus* brief filed in a citizen suit under the Act, the United States stated:[10]

> The United States considers the Section 505 "citizen suit" provisions a valuable adjunct to federal enforcement of the Clean Water Act. The provisions, responsibly invoked, provide a useful supplement to federal and state enforcement resources and a strong deterrent to future violations.

Similarly, as we have noted above (p. 3), the Senate Report on the 1987 amendments states that citizen suits are operating "as Congress intended—to both spur and [as a] supplement to government enforcement actions." S. Rep. No. 50, *supra*, p. 28. In short, petitioner's argument has already been rejected by both Congress and the executive branch.

Finally, petitioner and several supporting *amici* suggest that the lower court's interpretation of Section 505 would raise constitutional problems. Pet. Br. 37, n. 48. They argue that penalties paid to the government for past violations cannot redress any injury to plaintiffs and that suits to recover such penalties therefore contravene the standing requirements of Article III. *Ibid.* They also argue that allowing citizens to seek such penalties

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9. To the extent that environmental contributions might be misused as a remedial option, there are adequate safeguards in the statute. First, all proposed consent decrees must be submitted to the Justice Department and EPA for review before they can be entered by a court. 33 U.S.C. 1365(c)(3), as amended, 101 Stat. 75. Second, the United States is not bound by citizen suit settlements and could seek the maximum statutory penalty for the same violations. 133 Cong. Rec. S 737 (daily ed., Jan 14, 1987) (remarks of Sen. Chafee).

10. Brief of the United States as Amicus Curiae in Support of the Constitutionality of Section 505 of the Clean Water Act, pp. 1-2, filed in *SPIRG* v. *Monsanto Co.*, 600 F. Supp. 1474 (D.N.J. 1985).

violates the separation of powers doctrine by vesting enforcement authority in citizens unaccountable to the electorate rather than in the executive branch. *Ibid.*

Both of these arguments have been squarely addressed and rejected by the lower courts. As to standing, the court in *SPIRG* v. *AT&T Bell Laboratories*, *supra*, 617 F. Supp. at 1200-1202, held that plaintiffs' members will benefit personally from imposition of civil penalties for purely past violations because the defendant would be specifically deterred from violating its permit in the future and other dischargers into the same waterway would be generally deterred from violating their permits in the future as well.

As to separation of powers, two district courts have found no constitutional infirmity with Section 505 on this ground. *SPIRG* v. *Monsanto Co.*, *supra*, 600 F. Supp. at 1478-1479; *Chesapeake Bay Foundation* v. *Bethlehem Steel Corp.*, 652 F. Supp. 620 (D. Md. 1987). The cases cited by the *amici* on this issue do not support their argument. In each of those cases, Congress attempted to deny authority to other branches of the federal government to exercise their constitutionally-allocated functions, and to grant such authority to persons not constitutionally permitted to exercise it.[11]

Citizen suits have neither of these features. First, they do not deny or limit the Executive's power to enforce the law. On the contrary, that power is specifically preserved by the numerous government oversight mechanisms in Section 505—advance notification of citizen suits, receipt of complaints, review of consent

11. Thus, in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and *Bowsher* v. *Synar*, 106 S. Ct. 3181 (1986), the Court held that Congress had unconstitutionally retained for itself the power to appoint (or remove) those charged with enforcing the laws it passed. In *Buckley*, Congress vested enforcement authority in a commission composed of eight members, four of whom were appointed by Congress. In *Bowsher*, Congress delegated to the Comptroller General, an official dismissable only by Congress, the power to designate mandatory cuts in the federal budget. In *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court held that Congress had unconstitutionally circumvented the Judicial Branch by assigning all bankruptcy authority to a non-Article III court. Thus, in all three of these cases, governmental power was shifted from its rightful possessor to a person not entitled to have it.

decrees, preemption of such suits by prior government suits, and intervention as of right. 33 U.S.C. 1365.

In *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1941), this Court upheld the constitutionality of a *qui tam* statute which provided citizens with far broader prosecutorial discretion than does the Water Act. The False Claims Act, as then in force, entitled the *qui tam* plaintiff to prosecute frauds committed against the federal government and retain one-half of the penalty collected. Act of March 2, 1863, 12 Stat. 696, 698, 31 U.S.C. 231-234 (1940).[12] That statute did not provide for any of the government oversight mechanisms in the Water Act. It therefore follows *a fortiori* that a statute such as the Water Act, which grants much more extensive protection to executive branch enforcement interests than do *qui tam* statutes, is constitutional.

Second, the citizen suit provision does not grant enforcement authority to a person not constitutionally authorized to exercise it. This Court recognized in *Davis* v. *Passman*, 442 U.S. 228, 241 (1979), that:

> Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating rights and obligations, to determine in addition who may enforce them and in what manner.

See also *Tigner* v. *Texas*, 310 U.S. 141, 148 (1940). It is therefore constitutionally permissible for Congress to create a cause of action for private citizens to remedy and prevent pollution of this nation's waterways.

The fact that citizens can recover civil penalties in such actions does not change this conclusion. Congress has frequently authorized private citizens to pursue actions for civil penalties. See,

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12. *Qui tam* statutes empower private citizens to sue for penalties owed to the government as a result of another's unlawful conduct. As a reward for assisting in the enforcement of the law, the *qui tam* plaintiff is entitled to a share of the penalty. See Note, *The History and Development of Qui Tam*, 1972 Wash. U. L.Q. 81. *Qui tam* actions "have been in existence for hundreds of years in England and in this country ever since the foundation of our Government." *Marvin* v. *Trout*, 199 U.S. 212, 225 (1905). See also *Adams qui tam* v. Woods, 6 U.S. (2 Cranch) 336 (1804).

e.g., False Claims Act, 31 U.S.C. 3730(b); Patent Act of 1952, 35 U.S.C. 292. In addition, in seeking such penalties, citizens are vindicating their own rights, not exercising governmental enforcement power. Under Section 505, a person "having an interest which is or may be adversely affected" (33 U.S.C. 1365(g)) by a defendant's unlawful pollution sues "on his own behalf" (33 U.S.C. 1365(a)) to remedy and prevent that pollution. It is therefore constitutional for Congress to authorize the judicial assessment of civil penalties as part of a package of remedies designed to afford complete relief and maximum deterrent effect against polluters.

CONCLUSION

For these reasons, the judgment below should be affirmed.

Respectfully submitted,

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